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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

IN THE MATTER OF ROBERT LEE ALLMAN

TOBER SAIFER SHOE COMPANY,
Petitioner

VS.

ROBERT LEE ALLMAN, AND
JAMES LARRY POSTON, Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 4, 1984

NO. _____

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

IN THE MATTER OF ROBERT LEE ALLMAN

TOBER SAIFER SHOE COMPANY, Petitioner

VS.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner TOBER SAIFER SHOE COMPANY respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceeding on July 9, 1984.

QUESTION PRESENTED

Whether, under 28 U.S.C. §1738, state law governs the collateral effect of a state court judgment in a federal bankruptcy dischargeability proceeding?

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OPINIONS BELOW

This case arose in a bankruptcy court adversary proceeding. The opinions of the United States Bankruptcy Court, the United States District Court and the United States Court of Appeals for the Fifth Circuit all appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 9, 1984. This petition for certiorari is filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

> §1738. State and Territorial statutes and judicial proceedings; full faith and credit
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies therof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

United States Code, Title 11:

§523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt -

* * * *

(2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by -

* * * *

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or

* * * *

STATEMENT OF THE CASE

This case is one of three cases now before the United States Supreme Court involving substantially the same issue of law. The first case docketed as No. 83-1634, styled Harold V. Simpson & Company vs. Ronald William Shuler, was actually the

last case of the three tried at the trial court level. The third case is styled In re: James Larry Poston; Patino's, Inc. vs. James Larry Poston and Robert Lee Allman, in which case Petition for Writ of Certiorari is being filed at the same time as this petition. Although there are different parties in the three cases, counsel for petitioner is the same in all three, the Bankruptcy Judge deciding the cases initially is the same, and the same Judge wrote each opinion for the Court of Appeals.

There was a fourth case styled Masonry Products, Inc. vs. Benavides, which reached the U.S. District Court (a different judge) and was reversed and remanded at that point. There, the District Court found state law on full faith and credit did bind the Bankruptcy Court on collateral estoppel. A copy of that opinion is also included in the Appendix.

The common question of law is whether the United States Bankruptcy Court is bound by principles of collateral estoppel and by the Full Faith and Credit Statute, 28 U.S.C. §1738 to give effect to prior state court determinations of the same issues of fact between the same parties. In each of these four cases, the procedural context in the Bankruptcy Court was that the creditor brought an adversary proceeding to determine non-dischargeability of a debt. The evidence before the Bankruptcy Court consisted of authenticated copies of the pleadings and judgments of the state court. In each of the four cases, the state court judgments followed normal state court practice, and granted the relief sought by the Plaintiff without detailed statements of all evidentiary facts being recited in the face of the judgment. In

each case, a reading of the Plaintiff's pleadings together with the judgment would compel one to conclude that the state court made fact findings in the rendition of its judgment which adjudicated factual issues sufficient to bar a discharge of the debt in a subsequent bankruptcy proceeding.

The four cases differed slightly in the state court procedural context:

1. Simpson vs. Shuler was a default judgment in the state court containing a conclusory finding in the judgment that "Plaintiff's cause of action is based upon a liquidated demand and debt for obtaining by false pretense the items furnished by Plaintiff,...".

2. In re Allman: Tober Saifer vs. Allman and Poston involved a judgment

entered upon the stipulation and agreement of all parties, all being then represented by counsel, that judgment should be entered against the defendants as prayed for in a total amount which included exemplary damages. The only possible basis or reason for exemplary damages was that shown by the pleadings of the Plaintiff which pled facts within the non-dischargeablility provisions of 11 U.S.C. §523.

3. In In re: Poston; Patino's, Inc. vs. Poston and Allman the defendants Poston and Allman were represented by the same counsel as in the Tober Saifer case and similar facts were pleaded in the state court respecting the fraudulent conduct of Defendants Pos-

ton and Allman. When answer date came, subsequent to the agreed judgment in the Tober Saifer case, Poston and Allman elected not to contest that litigation and judgment was entered against them by default. That default judgment made a fact finding that "... the indebtedness sued upon and made the basis of this judgment was incurred by obtaining property by false representations and actual fraud other than a statement respecting financial condition, and also by fraud and defalcation while acting in a fiduciary capacity, done by Defendants jointly and severally: ...". The judgment included an award of exemplary damages, explainable only by reference to the petition for exemplary damages on the basis of the fraud of the defendants.

4. In Masonry Products v. Benavides, the judgment in the state court came at the pre-trial stage in a summary judgment proceeding.

Therefore, with the above-noted slight procedural differences, the issue now comes before this Court. The creditor in this case, as in each of the three pending cases, brought an action in state court for its debt and for determination that the debt was incurred in a manner which precisely fit the language of the federal statute, 11 U.S.C. Sec. 523, declaring that particular kind of debt not dischargeable in a bankruptcy proceeding. The state court had unquestioned jurisdiction of the subject matter and the parties. The state court made its findings of fact in every case in favor of the Plaintiff awarding the relief sought by the Plaintiff.

Thereafter the debtor filed a voluntary petition in bankruptcy and the creditor filed a complaint in the Bankruptcy Court to determine the non-dischargeability of the debt. In each case the matter was not heard in the United States Bankruptcy Court until a time sufficiently long enough after the state court determination that the witnesses who were employees of the creditor at the time of the operative facts were no longer available as witnesses. Therefore, the creditor in each case relied upon the principles of collateral estoppel and full faith and credit in the submission of the authenticated state court documents as controlling evidence in the case. The debtors in bankruptcy, offered no controverting evidence whatever. In each case the Bankruptcy Court simply held that

it was not bound to accept the prior adjudications made by the state court and such ruling was upheld through the United States Court of Appeals.

Copies of the relevant state court pleadings and judgments are included in the Appendix to this petition, as well as copies of the three federal court opinions.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. THE DECISION BELOW IS IN CONFLICT WITH THE EXPRESS LANGUAGE OF 28 U.S.C. §1738, AND IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The pertinent part of 28 U.S.C §1738, defining the nature of the full faith and credit to be given, states "such . . . judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken." (Emphasis added) It is plain that state law governs the collateral estoppel effect of the prior state court adjudication. The United States Supreme Court has so held in Allen v. McCurry, 449 U.S. 90, 96 (1980). In the Allen case Mr. Justice Stewart clearly

noted that there are federal rules of collateral estoppel which may be applied when determining the preclusive effect of the decisions of other federal courts but that ". . . Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so: . . .". (Emphasis added)

The Fifth Circuit and other courts below erred by imposing some different standard, perhaps a federal standard, perhaps a Fifth Circuit standard, perhaps a standard known only to the court so holding, when considering full faith and credit. It is abundantly clear from reading the opinions of the courts below that no attempt was made to determine the state law effect of the State of Texas laws with

respect to preclusive effect on fact issues determined in the judgments of the courts of Texas. Indeed, the opinion by Honorable Circuit Judge Tate makes no reference to Texas law whatever, refering to nothing more than two prior opinions of the Fifth Circuit mentioning Fifth Circuit rules of issue preclusion and collateral estoppel.

While paying lip service in passing to an opinion of the United States Supreme Court in Brown vs. Felsen, 442 U.S. 127, 139 n.10 (1979), the Honorable Fifth Circuit Court went on to ignore the principles of collateral estoppel mentioned in Brown as well.

The Fifth Circuit sought in this case and the related cases to establish a new and heretofore unknown requirement for the giving of collateral estoppel effect. The Fifth Circuit fashioned a new test, being:

"Whether the federal court would be able to discern from the state court record all of the subsidiary evidentiary facts upon which the allegations were made and upon which the state court ultimately relied in stating its conclusions and rendering its judgment." THERE HAS NEVER BEFORE BEEN SUCH A REQUIREMENT PLACED UPON STATE COURT JUDGMENTS. STATE COURTS OF TEXAS DO NOT HAVE SUCH A REQUIREMENT IN GRANTING FULL FAITH AND CREDIT TO THEIR OWN JUDGMENTS.

This misapplication of federal statute and conflict with decisions of the United States Supreme Court should justify the grant of certiorari to review the judgment below.

2. **TEXAS LAW WOULD COMPEL ISSUE PRECLUSION.**

There are two principal pleading systems used in the several states of our

union: (1) fact pleadings (requiring detailed allegation of all evidentiary facts); and (2) notice pleadings (requiring only fair notice of the claim asserted). Texas is a notice pleading state, having long ago abandoned any requirement for allegation of evidentiary subsidiary facts in the pleadings. Rule 45, Texas Rules of Civil Procedure, defines the system, and Rule 47 of T.R.C.P. provides, in pertinent part, in setting the standard for alleging "Claims for Relief" that the pleading shall simply contain "(a) a short statement of the cause of action sufficient to give fair notice of the claim involved." The case law is in accord to the effect that it is not necessary in Texas to plead evidence or set out detailed facts. It is only necessary to set forth in conclusory form the fact conclusions which state a cause of

action. Roberts vs. Roberts, 621 S.W.2d 835, 837 (Tex.Civ.App--Waco 1981, no writ); Edwards Feed Mill vs. Johnson, 158 Tex. 313, 311 S.W.2d 232, 234 (Tex.Sup. 1958). Under Texas law (T.R.C.P. Rules 85 and 91) the debtors as defendants in the state court had the full and fair opportunity to require more specificity but failed to do so. The pleadings and the judgment in this case were completely in keeping with established law and established usage in the courts in the state of Texas. The language of the pleadings and the language of the judgment clearly show a final judgment by consent of all parties which granted the relief sought by the plaintiff including exemplary damages. The record is plain that such damages could only be awarded upon the pleadings for $2,000.00 exemplary damages which were based entirely

upon the fraud and false pretenses of the debtors. Such is the only conceivable explanation for the judgment.

Moreover, it has been well established law for a very long time in Texas that "the scope of an estoppel is governed by the matters set up in the pleadings." 34 Tex. Jur.2d 607, Judgments §524 (citing further numerous authorities). If the factual issue is necessarily included within the scope of the pleadings, then it is finally determined and given conclusive collateral estoppel effect, whether or not there is any recitation of facts in the face of the judgment. Indeed, that is precisely the effect given by Texas courts to the judgments of federal courts under state law principles of collateral estoppel. Wilhite vs. Adams, 640 S.W.2d 875, 876 (Tex. Sup. 1982). It matters not at all whether the fact that

the matter was adjudicated appears on the face of the judgment paper itself so long as it was adjudicated under the pleadings in the case. 34 Tex.Jur.2d 597-600, Judgments §520 (citing numerous authorities).

The record in this case clearly and without the possibility of contradiction shows that the issue of the fraudulent conduct of the debtors was necessarily determined in the state court litigation and that the award of damages which was agreed upon by all parties and adjudged by the court could not have possibly been composed of anything other than the actual damages and the exemplary damages alleged for such fraudulent conduct. The Appendix contains the text of the pleadings and of the judgment.

3. THIS CASE RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT REGARDING APPLICABILITY OF 28 U.S.C. §1738 IN FEDERAL BANKRUPTCY DISCHARGEABILITY HEARINGS.

The opinion of the Fifth Circuit in this case, and the other related cases mentioned above, constitute the only reported appellate authority on the precise issue. Although the United States Supreme Court has heretofore spoken clearly on collateral estoppel issues and full faith and credit issues, the Court has not heretofore written on applicability of this legal principle and federal statute to a bankruptcy dischargeability proceeding.

It is respectfully submitted that the Fifth Circuit has erred in applying some new notion of federal estoppel law with new requirements rather than following the express language of the Full Faith and Credit Statute as heretofore interpreted by

the United States Supreme Court. The error needs to be corrected, and the applicability of correct principles of law in this area needs to be established by a decision of the United States Supreme Court.

Although there have been cases involving common law res judicata and common law collateral estoppel, this appears to be the first opportunity for clear writing upon the necessity for use of state law standards of collateral estoppel when employing the federal Full Faith and Credit Statute.

Certainly, it is recognized and should be recognized that the federal courts have exclusive jurisdiction over the legal issue of dischargeability of a debt in bankruptcy proceedings. It should be equally clear, however, that the federal courts will respect the federal statutes which grant issue preclusion by giving full faith and

credit to state court judgments. It should be made abundantly clear that the full faith and credit required is the same which a state gives to judgments of its own courts.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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314 West 11th St., Suite 500
Austin, Texas 78701-2186
512/476-6003

By: Don L. Baker
Don L. Baker

September 4, 1984 COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 1984, three copies of the Petition for Writ of Certiorari were mailed, first-class postage prepaid, to Joseph D. Martinec, Esq., Martinec & Hargadon, 600 West 12th Street, Austin, Texas 78701, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Don L. Baker

DON L. BAKER

APPENDIX

NO. 301,709

TOBER SAIFER SHOE CO.	X	IN THE 126TH DISTRICT COURT
VS.	X	OF
KIRBY'S SHOE STORE	X	TRAVIS COUNTY, TEXAS

PLAINTIFF'S
ORIGINAL PETITION

1. Parties. Plaintiff is Tober Saifer Shoe Co. The corporate Defendant is Kirby's Shoe Co., Inc., doing business as Kirby's Shoe Store, whose president, Larry Poston, may be served with process at 1433 West Ben White Blvd., Austin, Travis County, Texas. The individual Defendants and their respective addresses for service of process are:

> Larry Poston, doing business as Kirby's Shoe Store, 1433 West Ben White Blvd., Austin, Travis County, Texas; and
>
> Robert Lee Allman, doing business as Kirby's Shoe Store, 1433 West Ben White Blvd., Austin, Travis County, Texas.

2. Facts. As shown in the attached statement of account, Plaintiff sold goods and services. These were billed in the name used by Defendants in their business enterprise and shown on such statement. Defendants accepted the goods and services and became bound to pay the stated price, which price is reasonable and fair, usual and customary.

3. Liability for Debt. Although proper demands for payment have been made, Defendants have failed to pay the account balance, due in the amount of $2,010.93. By reason of their failure to comply with various legal requirements pertaining to corporations, the individual Defendants have become individually liable on this debt. The business of the Defendants was also conducted as a partnership at the time

of the incurrence of this debt and each individual Defendant is liable as a partner.

4. Debt Against Defendant, Allman, Shown by Instruments. Attached hereto are copies of two instruments executed and delivered by Defendant, Robert Lee Allman. Plaintiff is the owner and holder of each such instrument. Defendant, Robert Lee Allman, has defaulted in the payment of the obligation represented by such instruments, consisting of two checks. The principal balance remaining due and unpaid on the dishonored checks is $2,010.93. Interest as damages on such amount at the rates provided by law should also be paid to Plaintiff. The dishonored checks with the signature of Defendant, Robert Lee Allman, without any designation cognizable by law of any representative capacity, show that

said Defendant is personally liable on this account.

5. Liability for Debt - Fraudulent Scheme. Defendants, Robert Lee Allman and Larry Poston, are also individually liable because of their participation in a fraudulent scheme to hinder, delay or prevent payment of this Plaintiff as a creditor. Defendant, Larry Poston, personally consented to and explicitly granted authority to Defendant, Robert Lee Allman, to execute the checks attached hereto. These checks were given to the agents for Plaintiff with the explicit representation that at the time the checks were given, there were sufficient funds in the account on which they were drawn to pay the drafts, and that there was a special arrangement whereby the checks would be made good upon presentment. These representations were made

intentionally for the purposes of defrauding Plaintiff, and for purposes of delaying and hindering collection of the debt by Plaintiff against Defendants. As shown on the face of the first check, it was returned insufficient funds and was not honored after being placed for collection. The agents for Plaintiff were informed that the second check would not be honored by the bank upon presentment, also because of insufficient funds. Because of their participation in this fraudulent scheme to delay and prevent payment to this creditor of Kirby's Shoe Co., Inc., the individual Defendants are liable for the account indebtedness sued for herein. Additionally, because of the participation of all Defendants in the fraudulent scheme, the court should excess exemplary damages of at least $2,000.00 jointly and severally against said Defendants.

6. Attorney's Fees. Though payment has often been demanded, the Defendants have failed to pay the account indebtedness. The failure of the Defendants to pay the account has made it necessary for the Plaintiff to employ the undersigned attorney to sue on the account. The repeated scheme of the Defendants to issue checks with the knowledge that no funds existed for the payment of the checks and for which each of the Defendants had actual knowledge before the issuance of said checks that they would not be honored, has also made it necessary for the Plaintiff to employ the undersigned attorney to sue on the account. This claim has been presented to each Defendant more than thirty days prior to the filing of this action and remains unsatisfied. A reasonable attorney's fee would be $700.00 for representation in the

trial court. In the event of any appeal from this court, further reasonable attorney's fees in connection with such appeal should be awarded to Plaintiff in an amount of no less than $2,500.00 for each such appeal.

7. Requests for Judgment. Plaintiff asks that citations issue and that Plaintiff have judgment against Defendants, jointly and severally, for the principal sum of the account, interest, interest as damages, punitive or exemplary damages, attorney's fees, costs of court, and for general relief.

LAW OFFICES OF DON L. BAKER
A PROFESSIONAL CORPORATION
314 West 11th Street, Suite 500
Austin, Texas 78701 476-6003

By: /s/
CHARLES E. HAMPTON

Attorneys for Plaintiff

NO. 301,709

TOBER SAIFER SHOE CO.	X	IN THE 126TH DISTRICT COURT
VS.	X	OF
KIRBY'S SHOE STORE	X	TRAVIS COUNTY, TEXAS

PLAINTIFF'S FIRST
SUPPLEMENTAL PETITION

1. Adoption of Pleadings. Plaintiff files this Supplemental Petition without waiver of any of the allegations contained in Plaintiff's Original Petition.

2. Misrepresentations and Breach of Duty. The debt herein sued upon was incurred by Defendants and each of them by fraud, by defalcation while acting in a fiduciary capacity, and by obtaining property and extension of credit by false pretenses, and also by use of a statement in writing that is materially false respecting the Defendant's financial condition upon

which the Plaintiff relied reasonably, and which the Defendants caused to be made or published with intent to deceive.

3. Attorney's Fees. By reason of the amount of legal work required in this case, including discovery work done and to be done in this cause, Plaintiff would respectfully show the Court that a reasonable fee to be awarded for the services of Plaintiff's attorney in this cause upon trial would be at least the sum of $2,000.00. In event of appeal to the Court of Civil Appeals, a reasonable fee would be at least the sum of $2,500.00. In event of appeal to the Supreme Court of Texas, a further reasonable fee would be at least the sum of $2,500.00.

4. Request for Judgment. Plaintiff asks that upon hearing, Plaintiff have judgment for the principal sum of its ac-

count, for interest, for all attorney's fees as may be within the jurisdiction of the Court, for costs of court, and for general relief.

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By: /s/
CHARLES E. HAMPTON

Attorneys for Plaintiff

NO. 301,709

TOBER SAIFER SHOE CO.	X	IN THE 126TH DISTRICT COURT
VS.	X	OF
KIRBY'S SHOE STORE	X	TRAVIS COUNTY, TEXAS

AGREED JUDGMENT

On this day came on to be heard the above styled and numbered cause, and it having been made known to the Court that Plaintiff and Defendants, by and through their respective counsel, have agreed that judgment should be entered for Plaintiff; and the Court having considered the pleadings and the official records of the Court, and being of the opinion that judgment should be entered for Plaintiff as agreed, Plaintiff having advised the Court that it was waiving interest:

It is, accordingly, ORDERED, ADJUDGED and DECREED that Plaintiff, Tober Saifer

Shoe Co., have and recover of and from Defendants, Kirby's Shoe Co., Inc. and Robert Lee Allman, both doing business as Kirby's Shoe Store, jointly and severally, judgment in the total sum of $6,010.93, together with interest thereon from date of judgment at the rate of 9 percent (9%) per annum until paid, and for all costs of court in this behalf expended for all of which let execution issue.

SIGNED April 13th, 1980.

/s/ Dale B Thurman, Jr.
JUDGE PRESIDING

APPROVED AND AGREED:

JOHN C. D. DROLLA, JR.
Attorney at Law
606 Guadalupe
Austin, Texas 78701

By: /s/
JOHN C. D. DROLLA, JR.

Attorney for Defendants

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By: /s/
DON L. BAKER

Attorneys for Plaintiff

NO. 301,709-A

TOBER SAIFER SHOE CO.	X	IN THE 126TH DISTRICT COURT
VS.	X	OF
LARRY POSTON, DBA KIRBY'S SHOE STORE	X	TRAVIS COUNTY, TEXAS

AGREED JUDGMENT

On this day came on to be heard the above styled and numbered cause, and it having been made known to the Court that Plaintiff and Defendant, by and through their respective counsel, have agreed that judgment should be entered for Plaintiff; and the Court having considered the pleadings and the official records of the Court, and being of the opinion that judgment should be entered for Plaintiff as agreed, Plaintiff having advised the Court that it was waiving interest:

It is, accordingly, ORDERED, ADJUDGED and DECREED that Plaintiff, Tober Saifer

Shoe Co., have and recover of and from Defendant, Larry Poston, doing business as Kirby's Shoe Store, judgment in the total sum of $6,010.93, together with interest thereon from date of judgment at the rate of 9 percent (9%) per annum until paid, and for all costs of court in this behalf expended, for all of which let execution issue.

SIGNED June 14th, 1984.

/s/ Hume Cobb

JUDGE PRESIDING

APPROVED AND AGREED:

JOHN C. D. DROLLA, JR.
Attorney at Law
606 Guadalupe
Austin, Texas 78701

By: /s/
JOHN C. D. DROLLA, JR.

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By: /s/
DON L. BAKER

Attorneys for Plaintiff

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE: JAMES LARRY POSTON AND WIFE, PAMELA C. POSTON, DEBTORS	X X X X X	BANKRUPTCY NO. 1-80-00378-E
TOBER SAIFER SHOE CO.	X X	
V.	X X	ADVERSARY NO. 1-81-0013
JAMES LARRY POSTON	X X	
IN RE: ROBERT LEE ALLMAN AND WIFE, LISA P. ALLMAN, DEBTORS	X X X X X	BANKRUPTCY NO. 1-80-00379-E
TOBER SAIFER SHOE CO.	X X	
V.	X X X	ADVERSARY NO. 1-81-0024 (ADVERSARY PROCEEDINGS
ROBERT LEE ALLMAN	X X X	CONSOLIDATED UNDER NO. 1-81-0024)

MEMORANDUM OPINION AND ORDER

This case comes before the Court upon the Complaint of Tober Saifer Shoe Co., Plaintiff, to determine the Dischargeabil-

ity of Debts of Debtors, James L. and Pamela C. Poston, and Robert Lee Allman and Lisa P. Allman. The Adversaries commenced by the Plaintiff creditor against the Debtors are consolidated under Adversary No. 1-81-0024-E.

The file and record of the consolidated proceeding indicates that on May 26, 1981, this Court entered Default Judgments in each of the Adversary proceedings prior to consolidation on October 29, 1981. The judgments by default were based on facts before the Court indicating summons and notice of Plaintiff's Complaints to Determine Dischargeability of Debts owed by the Debtors to Tober Saifer Shoe Co. had been served upon the Debtors, but they had failed to answer. Prior to the entry of these judgments, the Plaintiff had sought Requests for Admissions of Fact and Written

Interrogatories from the Debtors; however, the Debtors failed to satisfy the requests. On June 8, 1981 and June 24, 1981, Motions for Rehearing were filed on behalf of the Debtors, Poston and Allman, respectively, by new counsel, Mr. Joseph Martinec. The Motions set forth sufficient good cause for this Court to grant the rehearing of each case on the basis of excusable neglect by the Debtor's substituted counsel, Mr. Wayne Langham, who it appears was suffering from acute emotional disorders during the initial pendency of the cases and who, in fact, had voluntarily committed himself to an Austin hospital for treatment of his disorders. The Debtors were granted additional time to serve upon the Plaintiff a motion or answer to the Complaints and to address the Plaintiff's requests for Admissions of Fact and Written

Interrogatories. The Debtors' (Poston and Allman) responsive pleadings, Answers to Interrogatories and Responses to Requests for Admissions were timely filed.

A hearing was held on the merits of the Plaintiff's Complaints on October 29, 1981 and on the basis of the testimony and evidence adduced at the hearing and the briefs submitted by counsel for the parties the Court is prepared to address the issues of fact and law presented.

The Plaintiff seeks nondischargeability under Section 523 of the Code for amounts owing to the Plaintiff, as supplier, from transactions made with the Debtors during their business as retailers. On January 31, 1980, Plaintiff, Tober Saifer Shoe Co., filed suit in State Court seeking recovery of an account balance of $2,010.93. Also sought by the petition

were $2,000.00 exemplary damages and attorney's fees in the amount of $700.00. On April 15, 1980 and on June 19, 1980, Agreed Judgments were entered, each providing that the Plaintiff "have and recover of and from the defendants" (Poston and Allman) "judgment in the total sum of $6,010.93". In support of its Complaints to have the debts declared non-dischargeable, Tober Saifer Shoe Co. relies upon the certified Agreed Judgments and underlying Original Petitions as well as its Requests for Admissions of Fact to establish the fact issues necessary to have the Debtors' debts declared non-dischargeable.

The Plaintiff's Original Petition and First Supplemental Petition as filed in the State Court are included in pertinent part in Footnote 1 herein.

The parties also sought by Joint Motion a severance of the causes of action and an Order granting the severance was entered. These pleadings are set forth in Footnotes 1A and 1B herein.

Subsequently, on April 15, 1980 and June 19, 1980 Agreed Judgments were entered by the Court as to Robert Lee Allman and Larry Poston, respectively. The Agreed Judgments are included in their entirety in Footnotes 2 and 2A.

The Plaintiff asserts this Court is barred from hearing evidence on matters found in the Agreed Judgments entered by the State court. The proposition is grounded upon theories of full faith and credit, res judicata and collateral estoppel. The argument that this Court is bound to the findings of the Judgments upon the basis of full faith and credit and res

judicata is without merit and accordingly is removed from further consideration in light of the Supreme Court's ruling in Brown vs. Felsen, 442 U.S. 127 (1979) which this Court finds is controlling on both theories.

The Court finds, however, that the narrower concept of collateral estoppel may be asserted as a bar to subsequent bankruptcy proceedings concerning issues previously litigated in State Court proceedings. Id. at 139 N. 10. This Court is mindful of the Opinion by the Court of Appeals for the Fifth Circuit in In re Merrill, 594 F.2d 1064, 1067 (5th Cir. 1979) holding that the party asserting the estoppel must show that the issue to be concluded is identical to an issue decided in the proper litigation, that it was actually litigated, and the decision on the

issue must have been necessary to the prior judgment. Indeed, in Brown v. Felsen, Justice Blackman intimated that collateral estoppel may be applicable in the appropriate case to conclude issues once the bankruptcy court has determined the State litigation actually and necessarily decided the same factual questions, and used the same standards which would be applied to determine dischargeability by the Bankruptcy Court. Id. at 139 N. 10. Nevertheless, by way of delineating the policy milieu in which these doctrines operate, or are found inoperable, the Court stated that Congress intended the Bankruptcy Court to have the "fullest possible inquiry" into allegations concerning the dischargeability of debts. Id. at 138. The Court noted that "absent trial on the merits, there is no particular reason to favor extraneous facts thrown

into a record for §17 purposes over facts addressed before the bankruptcy court." Id. at 135. Such a stance should be particularly appropriate when examining what is ostensibly a State Court collection proceeding. See Id. at 134-35.

Following the rationale and standards of Brown vs. Felsen (supra) and In re Merrill (supra) this Court finds it is faced with a limited and insufficient State Court record in each of the cases upon which to determine whether the State Court actually and necessarily litigated the same issues and applied the same standards as must be applied by a Bankruptcy Court. Therefore, this Court is compelled to find it is not bound by collateral estoppel as to either of the Judgments.

The only specific finding recited by the Agreed Judgments entered into between

the Plaintiff, Tober Saifer Shoe Co., and the Defendants, Larry Poston and Robert Lee Allman, doing business as Kirby's Shoe Store, is that the Plaintiff "have and recover of and from the Defendants, Larry Poston and Robert Lee Allman, doing business as Kirby's Shoe Store, judgment in the total sum of $6,010.03." The only construction this Court can impose on the Judgments is to find the State Court limited itself to a statement of the validity of the indebtedness. Since the Judgment makes no specific recitals as to fraud, defalcation, or any of the other allegations in the Plaintiff's Original Petition and supplementary petitions, this Court can only assume no findings on the matters contained therein were made.

Those factual issues ignored by the Judgments are not within the scope of any

estoppel created by the Judgments. The factual issues alleged by Plaintiff's pleadings, but omitted from the Judgments, were disposed of by necessary implication. Since the parties entered into Agreed Judgments for a specific amount and no further recitals were made in the Judgments, the effect of the Judgments is that they determined the validity of the indebtedness, but that none of the other allegations were proved or essential to the Judgments. See Herman v. Allen, 128 S.W. 115, 116 (Tex. 1910); Evans v. McKay, 212 S.W. 680, 687 (Tex. Civ. App. - Dallas 1919, no writ); Hudson v. Childree, 156 S.W. 1154, 1155 (Tex. Civ. App. - Texarkana, 1913, no writ). As the Court in Telluride Power Co. of Texas v. City of Teague, 240 S.W. 950, 954 (Tex. Civ. App. - Dallas, 1982, no writ) stated: "Any judgment which the

parties to a suit cause to be entered by a bona fide agreement, no fraud being practiced in it, is binding upon them regardless of what the pleadings and evidence may be, and such judgment is conclusive as an estoppel." Indeed, the Motion and Order of Severance entered into by the State Court on April 15, 1980 specified the parties were not in agreement as to the liability of the Defendant, Larry Poston. (See Footnotes 1A and 1B) The Agreed Judgment which followed only indicates to this Court that the parties agreed to the amount of indebtedness and nothing more. Indeed, since Agreed Judgments are involved, a decision on the issues raised by the pleadings was not necessary for entry of the judgments. In re Merrill, 594 F. 2d 1064, 1067 (5th Cir. 1979). Therefore, the question becomes whether the Plaintiff has offered

sufficient evidence upon which to base a finding of non-dischargeability. The Court finds the Plaintiff has not carried its burden with sufficient evidence.

Therefore, the Court finds and it is hereby ORDERED that the debts sought to be declared non-dischargeable should be, and they are hereby, DISCHARGED in bankruptcy.

Accordingly, Plaintiff's request for the imposition of a constructive trust upon Defendants' real property is hereby DENIED.

Furthermore, Plaintiff's request for attorney's fees is also DENIED.

SIGNED AND ENTERED this 14th day of September, 1982.

JOSEPH C. ELLIOTT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE ALLMAN	X	
	X	
TOBER SAIFER SHOE CO.	X	
Plaintiff-Appellant	X	
	X	CIVIL ACTION NO.
V.	X	A-82-CA-563
	X	
ROBERT LEE ALLMAN,	X	
JAMES LARRY POSTON,	X	
and PAMELA C. POSTON,	X	
Defendants-Appellees	X	

AMENDED MEMORANDUM OPINION

Pursuant to Federal Civil Procedure Rule 60(a), the Court substitutes this memorandum opinion for the opinion it entered in this case on February 7, 1984.

This case is before the Court on appeal from bankruptcy court. Having reviewed the record on appeal, the briefs of the parties, and the pleadings on file, the Court finds that the facts and legal arguments are adequately presented in the briefs and record and that its decision

would not be significantly aided by oral argument. See Bank. R. 8012. The Court affirms the decision of the court below.

The plaintiff, Tober Saifer Shoe Co., seeks nondischargeability under section 523 of the Bankruptcy Code for amounts owing to it from transactions made with the defendants, James and Pamela Poston and Robert Allman, during their business as retailers. Tober Saifer asserts that the bankruptcy court was barred from hearing evidence on matters found in an agreed judgment previously entered by a state court in favor of Tober Saifer's claim against the defendants. Tober Saifer further asserts that the bankruptcy court erred in failing to impose a constructive trust on the defendants' property.

Tober Saifer's argument rests on the theories of full faith and credit, res

judicata, and collateral estoppel. The proposition that a bankruptcy court is bound to the findings of a state court judgment because of res judicata and the full faith and credit clause has been rejected by the Supreme Court. Brown v. Felsen, 442 U.S. 127 (1979). The Court expressly held that "the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry in the true nature of the debt. Id. at 138. Accordingly, Tober Saifer's argument is invalid insofar as it invokes the full faith and credit clause and the doctrines of res judicata.

Tober Saifer is correct in asserting that collateral estoppel may bar a party in bankruptcy court from relitigating an issue that has already been decided in a prior adjudication in state court. Merrill v.

Walter E. Heller & Co. (In re Merrill), 594 F.2d 1064 (5th Cir. 1979). Federal rules of collateral estoppel apply in bankruptcy proceedings. Id. at 1066 n.1. Under federal rules, if an issue was not actually litigated in the prior proceeding, as is true with the agreed judgment in this case, then collateral estoppel does not bar relitigation in the bankruptcy court. Spilman v. Harley, 656 F.2d 224 (6th Cir. 1980). The agreed judgment issued against the defendants in this case therefore did not preclude relitigation of any issues in bankruptcy court.

Tober Saifer asserts also that the bankrutpcy court erred in not imposing a constructive trust in its favor on the defendants' real property. While state law determines whether property is subject to a constructive trust, "the issue of whether

the property [is] indeed so impressed [is] properly determined as a federal bankruptcy issue by the bankruptcy court . . . ." Texas v. Wellington Resources Corp., 706 F.2d 533 (5th Cir. 1983).

According to Patino's, the elements necessary to impose a constructive trust have been established either by the state court judgment or by admissions in the proceedings before the bankruptcy court. As noted above, the agreed judgment in state court did not bar the bankruptcy court from reconsidering the question of a constructive trust. Furthermore, the bankruptcy court properly granted the defendants' motion for a rehearing, after which they negated the effect of their earlier failure to respond to Tober Saifer's request for admissions. See Bank. R. 7055, 9024; Fed. R. Civ. P. 60(b). The bankrupt-

cy court found that Tober Saifer failed to present sufficient evidence to sustain its burden of proof. Since the bankruptcy court's denial of a constructive trust was not clearly erroneous, this Court may not disturb it. Bank. R. 8013.

The decision of the bankruptcy court is **AFFIRMED.**

ENTERED this 13th day of February 1984, in Austin, Texas.

/s/

JACK ROBERTS
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE MATTER OF ROBERT LEE ALLMAN,
Bankrupt

TOBER SAIFER SHOE COMPANY,
Plaintiff-Appellant,

V.

ROBERT LEE ALLMAN, JAMES C.
POSTON AND PAMELA C. POSTON,
Defendants-Appellees,

Fifth Circuit

July 9, 1984

Before TATE, HIGGINBOTHAM and DAVIS, Circuit Judges.

TATE, Circuit Judge:

In these proceedings under the Bankruptcy Code of 1978, 11 U.S.C. § 101 et seq., the creditor, Tober Saifer Shoe Company ("Tober Saifer"), sought to have a debt owed to it by the debtors, Robert Allman, James Poston and Pamela Poston, declared nondischargeable under the exceptions to dischargeability set forth in § 523 of the Bankruptcy Code, 11 U.S.C. §

523. The bankruptcy court found the debt to be dischargeable, and the district court affirmed. The creditor appeals, primarily contending that the bankruptcy court improperly refused to give collateral estoppel effect to a prebankuptcy state court judgment against the debtors. Finding no merit to the creditor's contentions, we affirm.

The creditor Tober Saifer filed a complaint in the bankruptcy court to determine the dischargeability of amounts owed to it by the debtors. The creditor alleged that the defendants, in their operation of a retail store, had obtained funds from Tober Saifer by "fraud", "defalcation while acting in a fidicuary capacity", "false pretenses", and "materially false [representations of] financial condition . . . made . . . with [the] intent to decieve."

For these reasons, Tober Saifer sought to have the debt declared nondischargeable under the provisions of § 523(a)(2) & (4) of the Bankruptcy Code, 11 U.S.C. § 523 (a)(2) & (4).

In support of its claim of nondischargeability, the creditor relied upon Texas state court proceedings that had, prior to the debtors' bankruptcy petition, resulted in "agreed judgments" in its favor against the debtors. Tober Saifer introduced in the bankruptcy court certified copies of the state court judgments and its state court pleadings. It also had filed in the bankruptcy court itself some requests for admissions of fact from the debtors.

The bankruptcy court held that it could not accord collateral estoppel effect to the state court judgments on the basis

of the record of the state court proceedings presented to it, and that the creditor did not otherwise introduce sufficient evidence to support its contention that the debt was nondischargeable. The creditor now appeals these determinations, which were affirmed by the district court.

I.

Tober Saifer contends that the bankruptcy court erred in failing to give collateral estoppel effect to the Texas state court judgments against the defendant debtors, because, it argues, the allegations of fraud made by it in its state court complaint were "found to be true" and "adjudicated as facts." However, the bankruptcy court reviewed the record of the state court proceedings as introduced by Tober Saifer and concluded that the state court

judgments did not determine that the debt was incurred through fraud or false pretenses, but rather were limited to the narrow issue of the validity or existence of the indebtedness. Applying the principles of collateral estoppel in bankruptcy dischargeability proceedings as enunciated by this court in Matter of Shuler, 722 F.2d 1253 (5th Cir. 1984), we find no error in the bankruptcy court's collateral estoppel determination.

[1] In Brown v. Felsen, 442 U.S. 127, 139 n. 10, 99 S.Ct. 2205, 2213 n. 10, 60 L.Ed.2d 767 (1979), the Supreme Court noted that collateral estoppel principles could, in a bankruptcy dischargeability context, bar relitigation of facts actually and necessarily decided in a prior suit. We have thus held "that collateral estoppel may apply to subsidiary facts actually

litigated and necessarily decided" in a prior judicial proceeding, Shuler, supra, 722 F.2d at 1256, though collateral estoppel does not "bar a bankruptcy court from receiving evidence as to facts by which that court may determine the character, and ultimately, the dischargeability of the debt." Id. at 1255; see also Carey Lumber Co. v. Bell, 612 F.2d 370, 377 (5th Cir. 1980). Therefore, in cases where the state court judgment "[does] not contain detailed facts sufficient as findings to meet the federal test of nondischargeability", leaving the bankruptcy court "unable to discern from the record the subsidiary facts upon which the false-pretense allegation was made," the bankruptcy court may properly refuse to accord collateral estoppel effect to the state court judgment. Shuler, supra, 722 F.2d at 1257-58.

[2] Though the state court pleadings in the present case alleged that the debtors obtained the owed amounts by fraudulent conduct and fales pretenses,[1] the state

---

[1]The relevant portion of Tober Saifer's state court complaint reads as follows:

> Liability for Debt - Fraudulent Scheme. Defendants, Robert Lee Allman and Larry Poston, are also individually liable because of their participation in a fraudulent scheme to hinder, delay or prevent payment of this Plaintiff as a creditor. Defendant, Larry Poston, personally consented to and explicitly granted authority to Defendant, Robert Lee Allman, to execute the checks attached hereto. These checks were given to the agents for Plaintiff with the explicit representation that at the time the checks were given, there were sufficient funds in the account on which they were drawn to pay the drafts, and that there was a special arrangement whereby the checks would be made good upon presentment. These representations were made intentionally for the purposes of defrauding Plaintiff, and for purposes of delaying and hindering collection of the debt by Plaintiff against Defendants. As shown on the face of the first check, it was returned insufficient funds (sic) and was not honored after being placed for collection. The agents for Plaintiff were informed that the second check would not be

court judgments agreed to by the parties contained no factual determination whatsoever as to the debtors' alleged fraud. The state judgment simply stated:

> On this day came on to be heard the above styled and numbered cause, and it having been made known to the Court that Plaintiff and Defendant, by and through their respective counsel, have agreed that judgment should be entered for Plaintiff; and the Court having considered the pleadings and the official records of the Court, and

honored by the bank upon presentment, also because of insufficient funds. Because of their participation in this fraudulent scheme to delay and prevent payment to this creditor of Kirby's Shoe Co., Inc., the individual Defendants are liable for the account indebtedness sued for herein. Additionally, because of the participation of all Defendants in the fraudulent scheme, the court should excess exemplary damages of at least $2,000.00 jointly and severally against said Defendants.

being of the opinion that judgment should be entered for Plaintiff as agreed, Plaintiff having advised the Court that it was waiving interest:

It is, accordingly, ORDERED, ADJUDGED and DECREED that Plaintiff, Tober Saifer Shoe Co., have and recover of and from Defendants, Kirby's Shoe Co., and Robert Lee Allman both doing business as Kirby's Shoe Store, jointly and severally, judgment in the total sum of $6,010.93, together with interest thereon from date of judgment at the rate of 9 percent (9%) per annum until paid, and for all costs of court in this behalf expended for all of which let execution issue.[2]

(An identically worded judgment was rendered against the defendant Larry Poston.)

[3, 4] Like the bankruptcy court, we can find nothing in the state court judgments against the debtors to suggest that the court necessarily determined that the creditor's funds had been obtained by false pretenses. Without even a conclusory statement as to the debtor's false-pretense conduct, which would itself be insufficient if unsupported by actually-litigated subsi-

[2]The creditor claims that the bankruptcy court should have read a "fraudulent conduct" determination into the state court judgments against Allman and Poston because those judgments allegedly contained exemplary damages awarded as a result fo the debtor's fraudulent behavior. The agreed judgments, however, nowhere state that the damages awarded are in part an award of exemplary damages or that the court found fraudulent conduct on the part of the debtors. Therefore, we agree with the bankruptcy court that, in the absence of a specific recital finding fraud on the part of the debtors, we can only assume that "the state court limited itself to a statement of the validity of the indebtedness."

diary facts in the record, see Shuler, supra, 722 F.2d at 1257-58, the bankruptcy court did not err in refusing collateral estoppel effect to the agreed upon state court judgments.[3]

---

[3]Tober Saifer also alleges that the bankruptcy court failed to give "full faith and credit" to the state court judgment as required by 29 U.S.C. § 1738. As we stated in Shuler:

> 28 U.S.C. § 1738 . . . provides in part that state judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State." The full faith and credit due a state court judgment is of course manifested by the res judicata or collateral estoppel effect accorded to that judgment. See Allen v. McCurry, 449 U.S. 90, 96, 101 S.Ct. 411, 415-16, 66 L.Ed.2d 308 (1980). Where, as in bankruptcy, the res judicata or collateral estoppel effect of state court judgments has been limited by competing federal interests, see Brown v. Felsen, supra, 442 U.S. at 136-37, 99 S.Ct. at 2211-12, the full faith and credit owing to the state court judgment may be correspondingly limited. Since the courts below properly assessed the collateral estoppel effect of the state court judgment in

II.

[5] The creditor Tober Saifer also contends that the nondischargeability of the debt owed to it by the defendant debtors was sufficiently established by the requests for admissions filed by it in the bankruptcy court, as to which it claims the debtors made no response and had thus admitted as a fact. In its memorandum opinion, the bankruptcy court expressly found that timely responses to the creditor's requests for admissions were filed by the debtors' substitute counsel. We find nothing in the record to suggest that the bankruptcy court abused its discretion in

> the present federal bankruptcy case, the full faith and credit principles of § 1738 have not been violated.

Shuler, supra, 722 F.2d at 1258 n. 10.

permitting and considering the responses filed by substitute counsel. Moreover, upon a review of the record before the bankruptcy court, we find no clear error in the bankruptcy court's determination that the creditor Tober Saifer failed to meet its ultimate evidentiary burden of showing the nondischargeability of the debts at issue.[4]

III.

In that we find no merit to the creditor Tober Saifer's contentions on appeal,

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[4]The creditor also challenges the bankruptcy court's refusal to place a constructive trust on the debtors' property that was allegedly purchased with the "fraudulently obtained" funds. Because we find that the bankruptcy court did not clearly err in concluding that the debts were dischargeable in that no false pretense or fraudulent conduct was shown pursuant to 11 U.S.C. § 523(a)(2) & (4), we find no error in its refusal to place a constructive trust on the debtors' property.

we AFFIRM the judgment of the district court affirming the judgment of the bankruptcy court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

MASONRY PRODUCTS, INC., Plaintiff-Appellant	X	
VS.	X	CIVIL NO. A-83-CA-635
RICHARD BENAVIDES, Defendant-Appellee	X	

ORDER

On this 5th day of January, 1984, came on for consideration the appeal from bankruptcy court in the above-styled and numbered cause. The Court having reviewed the record on appeal, the briefs of the parties, and the pleadings on file in the appellate record enters the following order. The Court having reviewed the state court judgment against Appellee has determined that the summary judgment proceedings entered in the state court are

sufficient to support a finding that there was evidence of defalcation in a fiduciary capacity. This Court is bound by the principle of collateral estoppel as to the fact issues determined by the state court judge. See Brown v. Felsen, 442 U.S. 127 (1979); International Association of Machinists vs. Nix, 512 F.2d 125 (5 C.A. 1975) and Spillman v. Harley, 656 F.2d 224 (6 C.A. 1981). This Court must therefore give full faith and credit to the state court judgment and holds that the findings and the summary judgment proceedings are sufficient to support the allegations in the pleadings on file. See Goodyear Tire and Rubber Co. v. Jefferson, 565 S.W.2d 916 (Tex. Sup.Ct. 1978). This Court hereby finds that the debt claimed by the Creditor is non-dischargeable and remands this cause to the Bankruptcy Court to enter a judgment

holding accordingly. It is further ORDERED that the Bankruptcy Court hear evidence on attorney's fees and the question of imposition of a trust upon the property of the Debtor herein.

IT IS SO ORDERED this 5th day of January, 1984.

/s/ James R. Nowlin

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

(2)

Office - Supreme Court, U.S.
FILED
NOV 19 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

IN THE MATTER OF ROBERT LEE ALLMAN,

TOBER SAIFER SHOE COMPANY,
Petitioner

VS.

ROBERT LEE ALLMAN, AND
JAMES LARRY POSTON,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Robert Allman and James Poston operated a shoe store in Austin, Texas. One of many suppliers to the Shoe Store was Tober Saifer Shoe Company. Tober Saifer sued Poston and Allman in state court using the shotgun offense made possible by word processors. As it is typical of many small businessmen who find themselves on the ropes, they agreed to a judgment, one which made no recitations about any of the elements of 11 USC Section 523 pertaining to dischargeability.

Subsequently, both Poston and Allman sought relief under Chapter 7 of the Bankruptcy Code wherein Tober Saifer raised the issue of nondischargeability.

Tober Saifer filed a complaint in the bankruptcy proceeding objecting to the discharge of its debt on the basis that it was one "for obtaining money, property, or services by false

pretenses other than a statement respecting financial condition." Upon trial of the complaint before the bankruptcy judge, Tober Saifer relied solely on the "false pretense" recitations of its state court petition; it offered no evidence to support the false pretense allegations in its complaint, and it offered no evidence that any evidence of that nature was considered by the state court judge. Indeed it did not because it could not. There was simply no fraud in the case which could be proved in any forum. But if it could raise its illegitimate and completely unfounded pleading to a judgment entitled to the sanctuary of res judicata, then it would have created the collection lawyer's paradigm--a grain of truth would have been converted into a nondischargeable unassailable pound of flesh.

SUMMARY OF ARGUMENT

The U.S. Bankruptcy Court has exclusive

jurisdiction to determine the dischargeability of a debt in a bankruptcy proceeding. No state court has jurisdiction to determine the issue of dischargeability, and hence 28 USC 1738 does not extend full faith and credit to any state court judgment to the extent such judgment purports to decide the issue of dischargeability. Being exclusively a creature of federal law, federal preclusion and collateral estoppel rules govern the effect of a state court judgment when it is sought to be utilized by any party before the bankruptcy court on the issue of dischargeability.

REASONS FOR DENYING THE WRIT

1. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AS TO THE PROPER APPLICATION OF 28 U.S.C. 1738.

The Petitioner cites Allen V. McCurry, 449 U.S. 90, 96 (1980) for the proposition that the federal courts should apply state law in determining the collateral estoppel effect of

prior state court adjudication. In the Allen case, the state criminal trial court refused, under Fourth and Fourteenth Amendment challenges, to supress certain evidence seized in a narcotics raid. In a subsequent civil suit against the arresting officers under 42 U.S.C.S. 1983, this court sustained the District Court's use of collateral estoppel to prevent the defendant from relitigating the search-and-seizure question adversely decided against him in the state court.

The difference in the Allen case and the instance case is readily apparent. No citations are necessary for the proposition that both the state and federal courts have jurisdiction to decide Fourth Amendment issues. In this case, however, only the federal courts, have jurisdiction to decide the issue of dischargeability of a debt in bankruptcy. The bankruptcy court has exclusive jurisdiction to

decide dischargeability questions, and no state court judgment may stand as a res judicata bar on that issue. Brown v. Felsen, 422 U.S. 127 (1979). Since the dischargeability issue cannot be adjudicated in state court, it is patently ridiculous to apply state law in determining the collateral estoppel effect of that which cannot be adjudicated in the state forum. This Court has already rejected Petitioner's reasoning in Simpson V. Shuler, 722 F2d 1253 (5th Circ. 1984) by denying the petition for writ of certiorari on October 1, 1984.

2. TEXAS LAW DOES NOT COMPEL ISSUE PRECLUSION.

Petitioners extensive recitation of state law regarding pleadings is illustrative of the point so clearly missed or avoided in Petitioner's case. This Court has essentially determined that questions of collateral estoppel must have a contextually appropriate answer. In

Brown V. Felsen, supra, and in all cases emanating therefrom, it is clearly the law of the land that 1) state courts do not have authority to try issues of dischargeability, and 2) bankruptcy courts are entitled to consider the circumstances of judgments taken while debtors are in dire straits.

The only case cited by Petitoner which related to a bankruptcy case was Wilhite V. Adams, 640 SW 2d 875 (Tx Sup 1982). Whilhite is poor authority for Tober Saifer's position because the state court honored the fully and actually litigated findings of the bankruptcy court. In any circumstance in which the "actually litigated" test is set forth, Petitioner's argument crumbles.

3. THE DECISION BELOW DOES NOT RAISE SIGNIFICANT AND RECURRING PROBLEMS OF COLLATERAL ESTOPPEL UNDER 28 U.S.C. 1738 IN BANKRUPTCY DISCHARGEABLILITY QUESTIONS.

The only recurring and significant problem

which the Fifth Circuit's decision raises is that it prevents collection lawyers from taking one the easy way. It forces them to actually prove up their dischargeability case in the bankruptcy court.

The Fifth Circuit's application of collateral estoppel fully insures that issues honestly litigated and determined in prior state court proceedings may be considered by the bankruptcy court in determining dischargeability issues. In appropriate instances the state court judgment may be conclusive. Carey Lumber Co. v. Bell, 615 F. 2d 370 (5th Cir. 1980). The application of federal preclusion and collateral estoppel rules requires that the dischargeability issue be fairly addressed, and the application of these rules is consistent with the concept of exclusive federal jurisdiction.

Recognizing this, the Petitioner urges this

Court to abandon it adopted in Brown V. Felsen, supra. We are told that the reasons for exclusive federal jurisdiction are not present today. We are further assured that there is "no danger of abuse in a pre-bankruptcy suit," when it is obvious what kind of abuse Petitioner seeks to achieve with its pre-bankruptcy suit. Absent the exclusive jurisdiction restraint, unwitting state court judges could determine the dischargeability issue by entering default judgments which parrot completely unfounded fraud pleadings in a petition.

The Fifth Circuit's decision governing the role of a state court default judgment in the determination of the dischargeability of a debt in a bankruptcy proceeding adequately and fairly protects the debtor from the unfounded fraud claim, and insures that the defrauded creditor have his day in court. The party which presently exists is derived from the exclusive

federal jurisdiction in dischargeability questions, and any departure from the exclusive jurisdiction rule would only serve the unscrupulous.

CONCLUSION

For these reasons, a writ of certiorari should not issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

ORIGINAL SIGNED BY
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of November, 1984, three copies of this Brief in Opposition was mailed via First Class U.S. Mail to Don L. Baker, BAKER & PRICE, 314 W. 11th Street, Suite 500, Austin, Texas 78701, Attorney for Petitioner, and further certify that all parties required to be served have been served.

ORIGINAL SIGNED BY
John C. D. Drolla, Jr.

John C.D. Drolla, Jr.